

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	4:05CR3019
	)	
Plaintiff,	)	<b>MEMORANDUM</b>
v.	)	<b>AND ORDER</b>
	)	
KHALAT JAMALTHAEAL ALAMA,	)	
	)	
Defendant.	)	

This matter is before the court on the defendant's notice of appeal ([filing 250](#)), the clerk's recent memo ([filing 251](#)) asking whether the defendant may proceed in forma pauperis and whether a certificate of appealability will issue, the defendant's motion for a certificate of appealability ([filing 252](#)), and the defendant's motion for leave to appeal in forma pauperis ([filing 253](#)). The pro se notice of appeal is filed with reference to the judgment entered on June 6, 2008 ([filing 247](#))<sup>1</sup>, which denied the defendant's motion to vacate, set aside, or correct his sentence pursuant to [28 U.S.C. § 2255](#).

Before the defendant's appeal can proceed, a certificate of appealability must issue. See [Fed. R. App. P. 22\(b\)](#). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." [28 U.S.C. § 2253\(c\)\(2\)](#). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c).

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<sup>1</sup> The defendant previously filed a motion to amend the judgment ([filing 248](#)), which the court denied on June 19, 2008 ([filing 249](#)).

Slack v. McDaniel, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

For the reasons set forth in the memorandum and order entered on June 6, 2008 (filing 246) which denied the defendant's motion, the court concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). Therefore, a certificate of appealability will not be issued.

The defendant was determined to be financially unable to obtain an adequate defense in his criminal case, and an attorney was appointed to represent him at trial. Although retained counsel represented the defendant on appeal, the defendant filed a prisoner account statement (filing 254) in connection with his recent motions which indicates that the defendant lacks funds to pay the appeal fee. Because the appeal appears to be taken in good faith, even though a certificate of appealability will not be issued, the defendant may proceed in forma pauperis on appeal pursuant to F. R. App. P. 24(a)(3).

IT IS ORDERED that:

1. A certificate of appealability will not issue in this case, and the motion in filing 252 is denied;
2. The motion in filing 253 is granted and the defendant may proceed in forma pauperis on appeal; and

3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

July 29, 2008.

BY THE COURT:

*s/ Richard G. Kopf*  
United States District Judge